IN THE HIGH COURT OF JUDICATURE AT BOMBAY

T. & I. J.

NOTICE OF MOTION NO.30 OF 2006

IN

TESTAMENTARY SUIT NO.75 OF 2005

IN

PETITION NO.378 OF 2005

...

Rupali Mehta ...Plaintiff

v/s.

Smt.Tina Narinder Sain Mehta ...Defendant

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Ms.Behram Kamdin i/b FZB Associates for the Plaintiff.

Mr.J.P.Sen i/b Humranwala & Co. for Defendant.

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CORAM: D.K.DESHMUKH, J.

DATED: 29TH AUGUST, 2006

JUDGMENT:

1. This Notice of Motion has been taken out by the Plaintiff in Suit No.75 of 2005. Petition No.378 of 2005 has been filed by the present Plaintiff Rupali Mehta praying for grant of letters of administration with the Will annexed. The letters of administration are sought in relation to the estate left behind by Captain Narindersain Bhimsain Mehta, who expired on 22nd December, 2004. The Defendant Tina Narinder Sain Mehta had filed a caveat and therefore the petition was converted into Testamentary Suit No.75 of 2005.

2. The Plaintiff has taken out this Notice of Motion seeking an order for appointment of the receiver as also seeking interim orders in relation to the property which according to the Plaintiff is left behind by the deceased.

3. An objection has been raised on behalf of the Defendant to the maintainability of this Notice of Motion seeking interim orders in relation to the

property which according to the Plaintiff is left behind by the deceased on the ground that in a petition filed for letters of administration with Will attached or in a petition for grant of probate, title of the deceased to the property or properties left behind by the deceased is not the subject matter of the suit and therefore, the court does not have power and jurisdiction to make interim orders in relation to the property.

4. I have heard the learned Counsel appearing for both sides in detail on this question. According to the Plaintiff, in terms of the provisions of Section 268 of the Indian Succession Act to the proceedings for grant of probate and letters of administration, the provisions of the Code of civil Procedure is applicable and therefore, according to the learned Counsel Section 141 of the Civil Procedure Code applies and therefore this court has the jurisdiction to make interim orders in relation to the property which according to the Plaintiff is left behind by the deceased. The learned counsel has relied on several decisions of different High Courts, even of this Court, to contend that the provisions of Section 141 of the Civil Procedure Code apply to a

testamentary suit. The learned Counsel also referred to several orders made by this Court granting interim orders in testamentary suits in relation to the properties. The learned Counsel also relied on a judgment of the learned single Judge of the Calcutta High Court in the case of **Priyamvada Devi Birla v/s. Laxmi Devi Newar and anr., 2005(4) CHN 544**.

5. Perusal of the preamble of the Indian Succession Act, 1925 shows that the Act has been enacted to consolidate the law applicable to intestate and testamentary succession. The Act has been divided into several parts and each parts has been divided into several chapters. Part-I of the Act deals with short title and contains the dictionary of the Act i.e. definitions of various words used in the Act and power of the State Government to exempt any race or tribe from the operation of the Act. Part-II deals with Domicile. Part-II deals with Marriage. Part-IV deals with Consanguinity. Part-V deals with Intestate Succession. Part-VI deals with Testamentary Succession. Perusal of section 57 of the Act shows that this Part-VI deals with testamentary succession of Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870

within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay. Part-VII deals with Protection of Property of Deceased person. Part-VIII deals with Representative Title to Property of Deceased on Succession and Part-IX deals with grant of Probate, Letters of Administration and Administration of Assets of Deceased. Part-IX is divided in 13 chapters. Perusal of Part-IX shows that it begins with section 217. Section 217 reads as under:-

> **217.Applicant of Part.-** Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the Will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this Part.

6. Perusal of the provisions of the above section shows that grant of probate and letters of

administration as also the administration of estate of the deceased in case of intestate succession is to be made and carried out in accordance with the provisions of this Part. Perusal of this Part shows that it makes provisions in detail as to how an application for probate or letters of administration is to be made. How that application is to be processed and how that application is to be decided. Section 268, which is found in Part-IX lays down that provisions of the Code of Civil Procedure are application. Section 269 is the only provision that I find in Part-IX of the Succession Act giving power to the court to interfere for protection of the property. Section 269 reads as under:-

> 269.**When and how District Judge to interfere for protection of property.-** (1) Until probate is granted of the Will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all

other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate.

7. Perusal of this section shows that special power which is conferred on the court by this section to interfere for protection of property till probate is granted is not available in cases where the deceased is Hindu, Muhammadan, Buddhist, Sikh or Jaina or an Indian Christian who has died intestate. There is no doubt that in the present case the deceased was Hindu and therefore Section 269 is not available. In my opinion, the very fact that the Legislature has made a special provision in Section 269 giving power to the court to make orders for protection of property during the pendency of the probate petition or a petition for letters of administration and restricted

that power in case of certain category of person indicates two things i) that in order to enable a testamentory court to make interim order in relation to the properties during the pending of probate petition or a petition for letters of administration, the legislature has to enact a provision in that regard and ii) that the legislature did not intend to confer such a power on the testamentory court in relation to the persons who are of the category mentioned in Section 269 (2) of the Act. So far as the Act is concerned, there is one more provision which gives power to the court to make orders for protection of the property and that provision is contained in Section 192 and Section 193. Sections 192 and 193 reads as under:-

> 192. **Person claiming right by succession to property of deceased may apply for relief against wrongful possession.-** (1) If any person dies leaving property, moveable or immoveable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after

actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.

193. **Inquiry made by Judge.-** The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made bona fide.

8. Sections 192 & 193 quoted above are found in Part-VII of the Act. Perusal of the provisions of Part-VII shows that the order for protection of the property under Part-VII is made by the Court in summary proceeding and the court can make such an order when the Court finds that urgent orders are necessary and the court cannot wait for the party to secure that order by adopting an ordinary remedy of civil suit. The order under Sections 192 and 193 can be made only to prevent a person having no rights in relation to the property taking forcible possession. Sections 208 and 209, in my opinion, are also relevant. They reads as under:-

> 208.Saving of right to bring suit.- Nothing contained in this Part shall be any impediment to the bringing of a suit either by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been evicted from the possession under this Part.
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> 209. Effect of decision of summary

> proceeding.- The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession; but for this purpose it shall be final, and shall not be subject to any appeal or review.

9. Perusal of the above quoted provisions shows that the order made by the Court under Part-VII does not prevent the party from bringing a suit on the same question and those orders are restricted only to the possessory aspect of the property. In other words, where the court finds that the party can conveniently institute a civil suit and obtain suitable order about protection of the property, the court will not only be justified but also would be under a duty to leave the party to adopt an ordinary remedy of civil suit. The Supreme Court has considered the scheme of Part-VII of the Act in its judgment in the case of **Uma Devi Nambiar and ors. v/s. T.C.Sidhan, (2004) 2 SCC 321.** Observations made in paragraph 17 to 22 of the judgment are relevant. They read as under:-

> 17. Now we shall deal with the scope of Section 208. The object of Part VII of the

Act is to protect the property appretaining to large estates in case of a dispute as to succession. This Part in some respect stands in a similar position to Section 145 of the Code of Criminal Procedure, 1973 (in short "the Code") with respect to certain specified properties, where its scope is large inasmuch as it embraces all properties moveable and immoveable and once for all its settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in proper court. (See Biso Ram v. Emperor). A person aggrieved by an order passed in a summary proceeding under Part VII, should seek remedy by a suit and not by an application for revision. This remedy is preserved by this section. (See Gourishankar v. Debiprasad). The suit should be a suit for possession by establishment of title. (see Bhoba Tarani v. Profulla.) Therefore, it should necessarily be by the person who needs to establish his title to claim any such possession on the basis of title.

18. By analogy to Order 21 Rule 63, it can be said that where an adverse order has been passed against the plaintiff, under Section 194 of the Act, the onus lies heavily on the plaintiff to show that he has a right which has been demised by the decision under Section 194. (See Dhirendra Nath Das v. Indra Chandra Kisriwala, Mohd.Ali Mohd. Khan v. Bismillah Begam, Sahdeo Karan Singh v. Usman Ali Khan, Ahmad Din Allah Ditta v. Partap Singh, Mohd. Ismail v. Hanuman Parshad and Masina Bavamma v. Yendru Papanna)

19. Coming to the scope and ambit of Sections 192, 193,194 and 195, it is to be noted that they form a part of Chapter XIII dealing with the modalities to be adopted for protection of properties of the deceased being covered by Part VII. These proceedings are essentially interlocutory in character and necessarily summary depending upon the filing of an application for relief seeking the court to determine who has a right to possession pending the final determination of the rights

of the parties in a regular suit.

20. Section 192, inter alia, provides that a person who claims right by succession can make an application in respect of a property, moveable or immoveable, left behind a person who has died. Section 193 provides for an enquiry by the District Judge to whom such an application is made and Section 194 deals with the procedure to be adopted when an application is made under Section 192.

21. The Court before taking any steps in the matter under Section 194 is required to be satisfied of the existence of such strong ground of belief on both points i.e. the person in possession has no lawful title and that the person applying is likely to be materially prejudiced if left to the ordinary remedy of a regular suit. An order under Section 194 is in the nature of summary decision and can only be passed if the conditions embodied in Sectuion 193 are fulfilled. The expressiobn "subject to a suit" means subject to a suit contemplated under Section 208 i.e. a regular suit to establish title and obtain possession.

22. The effect of a summary decision even in an extreme case is not a bar to a regular suit. The underlying object of Section 208 and Part VII is particularly to protect the property appertaining to large estates in case of a dispute as to succession. As noted above, it has great similarity to a proceeding under Section 145 of the Code with respect to certain specified properties where its scope is large inasmuch as it embraces all properties moveable and immoveable and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in proper court by appropriate proceedings. A person aggrieved by an order passed by a summary proceeding under Part VII is required to seek remedy by a suit and not by an application for revision. This remedy is preserved by Section 208. Section 209 makes the position further clear. It provides that

> the decision of a District Judge in a summary proceeding under Part VII shall have no other effect than that of settling the actual possession, but for this purpose it shall be final and shall not be subject to any appeal or review. But where instead of a summary disposal, there is in-depth analysis of the evidence and conclusive conclusions/decisions arrived at, it cannot be said that there has been a proper exercise of the power conferred while dealing with an application under Section 192 of the Act.

It is thus clear that for making an application under Section 192, it is not necessary that any proceeding for probate or letter of administration should be pending. But order can be sought only in relation to possession of property of the deceased, and only when the orders are urgently needed. In so far as the present notice of motion is concerned, it is nobody's case that the notice of motion is taken out under Section 192 of the Act.

. Section 247 of the Act vests power in the court to appoint an administrator of the estate of the deceased person. Section 247 reads as under:-

> Administration, pendente lite.- Pending any suit touching the validity of the Will of a deceased person or for obtaining or revoking any probate or any grant of letters of

> administration the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

Perusal of the provisions of Section 247 shows that the court itself does not while making an order for appointment of administrator decide what is the property left behind by the deceased and it does not make any interim order in relation to the property.

10. Thus, to my mind, it is clear that in the Act itself there is no provision made authorising testamentory court to make interim order as a matter of course for protection of the property during the pendency of the testamentary suit.

11. No doubt not only Section 141, but the entire Civil Procedure Code is applicable to a testamentary suit. Therefore, the power of the court under Order

XXXIX would also be available to the court for making orders of temporary injunction. But for making an order of temporary injunction under Order XXXIX, the property in relation to which the order is sought has to be subject matter of the suit. Similar is the case with the provisions of Order XL, in relation to appointment of the receiver. An order of temporary injunction or an order appointing the receiver can be made by the court only in relation to the property which is subject matter of the suit. A civil court can also make interim order in relation to property which is not the subject matter of the suit, but interim order in relation to such property is necessary to be made to secure the execution of the decree that the court may pass in the suit. However, in a testamentary suit, property left behind by the deceased is not the subject matter of the testamentary suit. The nature of decree that the testamentary court passes is such that to secure its execution it is not necessary for the court to make any interim order in relation to any property. The Division Bench of the Patna High Court in its judgment in the case **Kashi Nath Singh v/s. Dulhin Gulzari Kuer, AIR 1941 Patna 475** has observed thus:

In an application for probate of a will or for the grant of letters of administration with a copy of the will annexed the sole question that arises is whether or not the will is a true one. It is not open to the probate Court to decide whether or not the property with which a testator has purported to deal, in fact, belonged to him. In 19 All 458 Sir John Edge said this:

> It has been contended that where an application for probate of a will is contested and it is alleged that the property dealt with by the will was not of the testator or was not property over which the testator had a power of testamentary disposal, it is the duty of the Court to try an issue raising this question. All we can say is that it would be exceedingly inconvenient if Courts in this country had to try such issue. A Court could never be quite sure that it had got the proper parties before it. It would be difficult always to be sure that there was no collusion in the case. It is much safer in the interest of the public that issues as to the title to property should be decided when the issues are raised in a regular suit, and not on an application for a grant of probate.

It is true that the learned Additional District Judge realised perfectly well that it would have been improper for him to decide whether or not the house and the orchard and kasht land described in the will actually

> belonged to Mr.Barta Kuar and not to her son, Ram Chariter Singh. It is, however, a pity that he did not also recognize that for more or less the same reasons as made this improper Kashi Nath Singh was not a person interested in the estate of the testatrix and as such entitled to oppose the grant. The result of permitting persons in such a position as Kashi Nath Singh to appear and contest the grant of probate or letters of administration may be very inconvenient and troublesome to the proponents of a will who are thereby put to the expense of proving it in solemn form when it might otherwise be proved in common form. I would dismiss this appeal with costs.

12. It is thus clear that in a petition for probate of a Will or a petition for grant of letters of administration the sole question that arises for consideration is whether or not the Will is genuine or not? The property left behind by the deceased is not the subject matter of decision of the probate court. These observations were made by the Division Bench of the Patna High Court while considering the question whether a caveat filed by a person who

disputes title of the testator to the property is maintainable or not and the Division Bench has held that a caveat filed by such a person is not maintainable. The Supreme Court has referred to the decision of the Patna High Court in **Kashi Nath Singh** case in its judgment in the case of **Shanta G.Z.Mehta v/s. Sarla J. Mehta & ors., AIR 2004 SC 1238** in its paragraphs 5 & 6 of its judgment. Those paragraphs 5 & 6 read as under:-

> 5. There is no dispute about the question of law that the Caveator who denies the title of the testator has no right to contest the will and his remedy is to approach the Civil Court to agitate the question of title. The learned Counsel for the plaintiff invited my attention to number of decisions of this point, where it has been uniformly held that the caveator who denies the title of the testator has no right to contest the probate proceedings. He has relied on A.I.R. 1932 Patna 89 (Ramyad Mahton v. Ram Bhaju Mahton); 1993(1) Bombay CR 340 (Eruch Rustom Irani v. Limji Kalkashroo Panday) AIR 1941 Patna 475 (Kashi Nath Singh v. Dulhin Gulzari Kuer); and some other decisions where it has been uniformly held

that if the caveator disputes the title of the testator, he has no right to lodge the caveat and the caveat has to be rejected. As already stated there cannot be any dispute about this proposition of law.

6. It may also be noted that in most of the cases cited above, the caveator had no personal interest in the property as an heir in the present case, the Respondents are daughter-in-law and grant children of the deceased testator. If the Will is not in existence or the Will is proved to be not genuine then there can be no dispute that the Respondents are entitled to a share in the property of the testator. Therefore, the Respondents being heirs are directly interested in challenging the execution of the Will.

As could be seen from the affidavit filed in support of the caveat, the Respondents have taken number of pleas challenging the execution of the Will.

It is only recently they have amended an affidavit to take one more plea that the testator had no competence to execute the Will in respect of the joint family property. It may be that the Testamentary court has no jurisdiction to go into the question of title. A mere fact that the caveators have been taken an alternative plea and that too "without prejudice" to other contentions their caveat cannot be rejected as contended on behalf of the plaintiff. In none of the decisions relied on by the learned counsel for the Plaintiff there is a case similar to the one before us, where the main defence is one of denial of execution of the Will and an alternative prayer and that too "without prejudice" is taken subsequently challenging the competence of the testator. Therefore, in my view none of the decisions relied on my the learned counsel for the Plaintiff are applicable to the facts of the present case. Here the Respondent being the natural legal heirs of the deceased along with the Plaintiff are entitled to challenge the execution of the Will. The mere fact that they have now taken

up a new and additional plea as an alternative plea and without prejudice to the earlier contentions cannot take away their defence. Hence, I am not impressed by the contention urged on behalf of the Plaintiff that the caveat is liable to be rejected and the proceedings should be treated as non-contentious.

13. It is thus clear that the Supreme Court has held that the proposition of law which is laid down by the Division Bench of the Patna High Court in its judgment in Kashi Nath Singh case is undisputable. The Supreme Court has also observed that the testamentary court has no jurisdiction to go into the question of title of the deceased to the property mentioned in the Will. It is thus clear that in a testamentary suit, the property which is mentioned in the Will or property which may be or may not be left behind by the deceased is not the subject matter of the testamentary suit, and therefore, in my opinion, in exercise of its power under Civil Procedure Code, the court would not be entitled to make any interim order in relation to protection of the property, unless, an order is required to be made by the court

in the peculiar circumstances under Part-VII of the Act.

14. So far as various orders made by this court from time to time making interim orders in relation to the property in testamentary suits are concerned, as the question of existence of the power in the court to make such an order was neither raised nor decided in those cases, they will not constitute a precedent, therefore, in my opinion, are not relevant for deciding the question. So far as the judgment of the learned single Judge of Calcutta High Court in the case of Priyamvada Devi Birla is concerned, the learned single Judge of the Calcutta High Court has proceeded on the assumption that the court has inherent power to pass suitable interim orders for protection of the property in probate petition. It is clear from the scheme of the Act to which I have made reference above, that there is no such inherent power available to the court. In my opinion, in view of the scheme of the Act, it will not be possible for any court to assume existence of such inherent power in the court.

15. For all these reasons, therefore, in my opinion,

Notice of Motion is not maintainable and hence it is disposed of.

At the request of the learned Counsel appearing for the Plaintiff, operation of the ad-interim order which is presently operating is continued for a period of four weeks from today.

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